

Barron County, Barron, Wisconsin**Office of County Administrator: Jeffrey S. French****Subject: Proposed Local Health Officer Ordinance****Date: August 25th, 2020****To: County Board Chair Okey & County Board of Supervisors**

Chair Okey, per our discussion of Tuesday August 25th, I am drafting this memo to help answer various questions as it relates to the proposed Local Health Officer Ordinance. I intend to use the Wisconsin Counties Association, *Guidance in Implementing Regulations Surrounding Communicable Diseases, an Analysis of Local Health Departments and Local Health Officer Powers, Duties, and Enforcement Actions*, as a basis to answer questions. Furthermore you asked me to draft this document in a question and answer format and to break down this complex issue into a conversational style.

Link to proposed Ordinance on B/C website:

[https://www.barroncountywi.gov/vertical/sites/%7B55B35465-9825-4C7F-A839-E0EDFC6408E8%7D/uploads/2020-08-24_\(1\).pdf](https://www.barroncountywi.gov/vertical/sites/%7B55B35465-9825-4C7F-A839-E0EDFC6408E8%7D/uploads/2020-08-24_(1).pdf)

Please pay special attention to page 6, of the proposed Ordinance, which describes additional local oversight.

Link to WCA Guidance Document on B/C website:

https://www.wicounties.org/uploads/legislative_documents/guidance-communicable-diseases-final.pdf

- #1. What are the applicable State Statutes or Administrative Codes pertaining to this decision?
State Statutes 252.03 and DHS 145.06, Wis. Adm. Code
- #2. Does Barron County Currently Have a Local Health Officer? (LHO)
Yes, these duties are delegated to one individual working within the Health and Human Services Department. The LHO must meet certain educational requirements as prescribed in State Statutes or Administrative code.
- #3. Is Barron County required to have a Local Health Officer?
Yes, by State Statues each County or City/County Health Department is required to have an LHO.

- #4. What happens if the LHO is eliminated on the local level?
Then it is presumed the State would step in, assume those duties, and bill the County for the accompanying costs. For all intents and purposes then the County Board forfeits their oversight to the State, of the LHO.
- #5. Why is this even an issue?
With the recent *“Legislature V. Palm decision and the resulting lack of a statewide order or regulation, local health officers and local governments instantly became the primary source of regulatory authority in relation to measures designed to abate the spread of the pandemic.”* p3.
- #6. Why not simply let this issue just drop?
I agree. However, this decision will linger, unless addressed, and will become relevant in the future. Therefore, why not address now, decisions never get easier with time. One might argue that a local general order should have the oversight of leadership, that is yourself, and ultimately the County Board. A second, salient argument is what legislative avenues should the County Board employ, now, to limit the powers of the LHO to issue a local general order.
- #7. I’ve been told this issue is new and a result of Governor Ever’s “Safer at Home Order”, is this true?
No. *“Wisconsin State Statutes relating to public health date back to 1887, with the creation of the first State Board of Health.”* p11. These Statutes were updated in 1981 by then Republican Governor Lee Dryfus, with a substantial overhaul.
- #8. If passed can you guarantee me there will be no overreach by government into my personal property or affairs?
No. I would be remiss to assume a future, LHO would not attempt an administrative overreach. However, II Legislative Oversight, A (1): as contained within the proposed Ordinance clearly states that before an LHO can issue a General Order three of four individuals must agree, a 75% pre-approval.

II Legislative Oversight:

Prior to the issuance of a General Order which shall impact the public at large, the Public Health Officer shall obtain approval of the County Board Chair, Health and Human Services Board Chair, County Administrator and the Health and Human Services Director who shall meet either approve or disapprove the issuance of the General Order. Approval requires a majority vote of the above listed individuals.

The ordinance, as proposed, also requires affirmative action by the County Board within 31 days.

- #9. What is the legal basis for Government trying to safeguard the public's welfare during a public health crisis?
This question is best answered by the US Supreme Court decision, (1905), *Jacobson V. Massachusetts*. I refer readers to pages eight and nine of the *WCA Guidance document*.
- #10. Are there any more recent court cases that address this issue?
Yes. *"In fact, as recently as 2007, the Wisconsin Supreme Court upheld the City of Milwaukee Health Department's imposition of an isolation order when the individual failed to follow protocol in relation to tuberculosis treatment."* p9.
- #11. Under current law does the LHO have the authority to to issue General Orders?
This issue is not clearly defined given the decision in *Legislature V. Palm*, the proposed Ordinance would grant such authority subject to local oversight, i.e. the County Board.
- #12. Does this Ordinance, as proposed, increase , or decrease the powers of the LHO as It relates to her/his Statutory duties as outlined in State Statutes?
This Ordinance has no effect on the LHO's ability to issue specific quarantine, isolation or outbreak orders however it does clarify her/his authority to issue a general order subject to the preapproval of the four individuals and subsequent CB ratification.
- #13. Does this Ordinance, as proposed, increase or decrease the **local** powers of the LHO?
It clarifies the LHO authority to issue a general order subject to the advance approval by three of the four members, or individuals listed in II Legislative Oversight and subsequent ratification by the full County Board.
- #14. Is there a Constitutional limitation on an order of general applicability?
Yes. Reference pages 24 to 26 of the *WCA Guidance document*.
- #15. How often would a General Order be issued by an LHO?
Rare, in-fact it is characterized as very rare, and a General Order must be based on, *"Such authority must be exercised in a manner that is reasonable and necessary and moreover, must be based upon conditions that are currently prevailing in the local health officers territory."* p6. Also a general order must be based on evidence relying on medical and scientific resources describing a communicable disease in addition to local conditions.

- #16. Does the LHO have the authority to enforce the General Order?
In addition to the Sheriff the LHO would have the authority to issue a citation. Prosecution would rest with the Corporation Counsel's office.
- #17. If passed what type of forfeiture is involved?
A civil forfeiture.
- #18. Can a General Order be issued without an enforcement mechanism?
Yes, compliance then is ultimately a voluntary choice, P27. WCA Document
- #19. In the proposed Ordinance: III. Violation, Penalty and Enforcement Procedures:, there is a wide-range of possible forfeiture amounts. Why is this?
The variation in the amount of the penalty is based on the severity and frequency of the infraction.
- #20. The proposed ordinance references legislative oversight and only mentions the County Board of Supervisors, why?
Because any General Order could, effect the entire County, and therefore, the County Board should be the legislative authority to either approve or disallow the LHO's General Order.
- #21. What are the specifics of the County Board's actions in this matter?
These are contained within the the Legislative Oversight, section of the proposed ordinance, and what they specify is the affirmative approval of the Board of Supervisors of the General Order or the General Order becomes of non-effect.
- #22. Can you break-down, questions #19 to #21., a bit further?
At its lowest level the ordinance specifies that the County Board will meet and either affirmatively confirm or deny the LHO Officers request for a General Order.
- #23. Can this ordinance, in the future, be changed in such a way that the penalty becomes criminal?
The State Legislature would need to amend state statutes to make this a crime.
- #24. Currently the Ordinance is pending before the Health and Human Services Committee, what is the process going forward?
The HHS Committee has scheduled a special meeting on Monday August 31st at 9.30am in Veterans Memorial Auditorium to discuss this matter. Practically then, this Committee should choose one of three courses of action.
- A. To not recommend approval, which ends the process.
 - B. To not recommend approval and refer to the Executive Committee

C. To recommend approval and refer to the Executive Committee.

Mr. Chairman, I would like to express my concerns with options B & C in-that the HHS Committee is the Committee of record and their disposition thereof should be given great consideration if referred to the Executive Committee.

#25. Are there Parliamentary Procedures that a member of the HHS Committee could employ at the 8-31 HHS meeting?

Yes, A member could make a call to the chair asking that no presentation be given by Corporation Counsel Mr. Muench, no public comment be taken, and that a motion be taken up to not approve this ordinance or recommend any such ordinance. The opposite could also be true, immediate approval.

Also, for example, a member could make the motion that this Agenda item be tabled indefinitely, effectively then it would take a Committee vote at another, future, meeting to remove it from the table. This approach is troubling because it, truly, is not a final disposition.

The point I am trying to make is I will not make a guarantee that a HHS Committee member will not or cannot take other, allowed, parliamentary procedures pertaining to this item. These actions, though rare, are allowed by Robert's Rules of Order.

#26. Ultimately, could this matter come before the County Board if the HHS Committee was to vote to not recommend?

Yes, I suppose it could, because ultimately agenda items for the County Board are under the final purview of the Board Chair.

Please see my concerns expressed under item #24.

This document is subject to change and/or modification based on the ever changing landscape surrounding this issue.

Addendum:

I incorporate into this document questions from the Chetek Alert, in black, and the responses thereto, in purple from LHO Officer Sauve.

As I'm sure you know this ordinance is creating quite the stir. There also seems to be less-than-accurate information going around on social media. I'm hoping you could answer some questions to help our readers and the public better understand what is going on.

- First off, I understand you requested the ordinance be considered. Why is it a good idea or needed? Since the Supreme Court ruled on the State Health Orders (Legislature V. Palm) there have been a lot of questions about the validity of Local Health Officer's Duties and Authority in State Statute 252.03. I did request the Barron County Board- via the Health and Human Services Board review the state statute and issue a local ordinance. This will help clarify what the Barron County Health Officer can or cannot do to control communicable disease. It is difficult to not have clear boundaries on roles and responsibilities. While much of the talk on social media right now is about overreach; public health has also been contacted by community members who feel we are not doing enough to control the spread of communicable disease, specifically COVID19.
- The crux of the issue seems to be general orders, whether or not they have penalties attached and how legislative oversight is handled. What would be your recommendation for this? Would it be what the draft suggests: general orders are in effect for 31 days, then expire unless approved by the board; and carry a fine of \$100–\$500? The proposed ordinance would not give the health officer unchecked powers. It is proposed any health orders under this ordinance would need to be a joint decision made by: health officer, health & human services director, county administrator, county board chair and the chair of the health and human services committee. Any orders put into place would then need to be approved or struck down by the full county board within 31 days. Public health always seeks to educate and obtain voluntary compliance first. Issuing fines is extremely time consuming and would be a last resort in serious situations.
- A number of residents and business owners are concerned and against the ordinance. Some say the ordinance allows a health officer to shut down all businesses, enter private homes and businesses for investigations, and issue fines if people don't comply. I am thinking this is an exaggeration of how health investigations actually work. Can you explain how investigations work and how privacy and orders are limited? We understand and respect that residents have concerns about their rights and privacy. The draft ordinance seeks to put checks and balances into the process to make sure that no one person has unlimited authority.

Public health investigations vary depending on the issue. Public health has always sought to educate and obtain voluntary compliance first. We do not enter private residences or

businesses against the owner's consent without going through a legal process. The legal process requires us to provide evidence and if the concern is deemed valid by the court system an inspection warrant may be issued. In the past this has been very infrequent and is typically due to a nuisance or human health hazard complaint. The two examples I can think of in the past four years include a residence being structurally unstable to the point of potential collapse and a case of extreme hoarding that endangered the people living in the home and first responders who entered the home. These situations are often referred to public health by concerned neighbors, family, or first responders.

Public Health understands that a key component of one's health is income. The higher your income, the healthier people tend to be. We have no desire to do a blanket shut down of business. In March, during the shutdown, public health along with county administration advocated for the ability to open up businesses locally due to our low case counts. Barron County Public Health has also continued to work with local businesses and employees who are quarantined due to COVID19 to find creative ways to keep employees working and businesses open while still protecting the health of the community. A couple of local businesses have chosen to shut down due to COVID19 cases but public health did not order them closed.

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